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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ANN "BANO" CUMMINGS, et al., Plaintiffs and Respondents, v. GEORGE D. CUMMINGS III, Defendant and Appellant.	H040710 (Santa Clara County Super. Ct. No. 1-12-CV-222017)

Respondents Ann "Bano" Cummings, Mary Cummings, and Joan Chlarson owned property in Los Altos Hills under a family trust together with their brother, appellant George Cummings III. In August 2013 respondents obtained a judgment granting their request for partition by sale of the property. On December 9, 2013, the court granted respondents the reasonable attorney fees and costs they had incurred through August 30, 2013. Appellant seeks review of this order, contending that it was unjustified and lacking in evidentiary support. We will affirm the order.

Background

We have summarized the factual history of this family dispute in a companion appeal in *Cummings et al. v. Cummings* (Nov. 23, 2016, H040069) [nonpub.opn.], which we ordered to be considered with the present appeal and two others, *Cummings et al. v. Cummings* (Nov. 23, 2016, H041307, H041308) [nonpub.opns.]. The focus of the underlying litigation was a 2.9-acre parcel and residence located in Los Altos Hills. The property had been owned by appellant and his sisters' grandfather, George D. Cummings,

and then by their father, George D. Cummings II.[1] At his death in October 2010 the second George D. Cummings left a trust under which the trustee was granted the power to "make contracts of every kind" with respect to trust property, including selling or partitioning it. Ann Bano Cummings and Mary Cummings were the designated successor trustees. Appellant was at that time living on the property with his girlfriend. His sisters conceivably could visit, but they found it difficult to stay at the house because there was too much clutter and debris to make the bedrooms usable.

Appellant opposed his sisters' efforts to arrange a sale of the property. Because Los Altos Hills had a one-acre minimum restriction on lot size, the subject property could not be divided into any more than two parcels. None of the siblings could afford to buy the others out; Ann Bano Cummings testified that there was "no choice" but to sell the property, and appellant had not devised any solid, viable plan to retain it. On April 5, 2012, a year and a half after their father's death, respondents filed this action for quiet title and partition by sale.

After extensive delays attributable to discovery conflicts[2] and continuances, trial took place between June 26 and July 10, 2013, with appellant representing himself. After hearing the evidence and closing arguments, the trial court ruled that in this situation "only . . . partition by sale can be granted" because of the city's requirement that a subdivision produce at least one acre per lot. It was thus "not practical" to divide the land

[1] At the time of his death, George D. Cummings II actually held a 50 percent interest, the remaining interest having passed from his sisters to his children and to Gloria Parker Tomaselli. Gloria predeceased George D. Cummings II, thus necessitating a search for her heirs.

[2] Appellant's failure to respond to discovery requests led to an award of sanctions against him on May 3, 2013.

in kind equally among the interested parties.[3] Consequently, partition by sale was both necessary and the most equitable "because of the nature of this property and the laws surrounding it." The court therefore appointed a referee to carry out its order and directed appellant to vacate within 30 days of the July 10 hearing. The court set a compliance hearing for August 16, 2013, at which time a writ of possession would be issued in favor of the referee. Meanwhile, the referee was given broad power to "sign off on anything that would normally require [appellant] to have to sign off," including execution of listing agreements, sale agreements, escrow instructions, and closing documents.

The court filed its interlocutory judgment and order on August 13, 2013. On August 19, 2013, appellant was served with respondents' amended motion for attorney fees and costs, which requested $95,755.90 incurred through July of 2013. Respondents asserted that such fees were authorized by Code of Civil Procedure sections 874.010, 874.020, and 874.040,[4] and that the amount requested was reasonable. The trial court agreed. Applying its equitable discretion, the court determined that in light of the factual and procedural history presented at trial, appellant should bear all of the costs of suit and attorney fees. After disallowing certain costs of $3,030.90, the court awarded respondents $115,000 as reasonable attorney fees and costs incurred through August 30, 2013. Appellant then filed a timely notice of appeal, his second in this litigation, from the court's December 9, 2013 order.

[3] The written order specified that the proceeds of the sale, after certain fees and other expenses, would be divided 50 percent to the trust, 11.25 percent to appellant and each respondent (Joan Chlarson and her husband, Michael Chlarson, to hold one share), and 5 percent to the heirs of Gloria Parker Tomaselli.

[4] All further statutory references are to the Code of Civil Procedure.

Discussion

Appellant challenges both the reasoning and the sufficiency of the evidence supporting the $115,000 award. He complains that the court acknowledged that all parties had access to the property and that there were personal items belonging to all of them; yet "when it came time to adjudicate Respondents' motions for attorney fees, the Superior Court flip-flopped and said such fees were warranted because '[t]he only person over these years who has been able to live on the property, use the property, control the property has been the [Appellant].' " Appellant argues that the record contains no substantial evidence or a "legitimate 'rationale' " for imposing on him the entire burden of respondents' attorney fees. Instead, he argues, the court was required to apportion the fees based on the percentage of each party's interest.

Appellant's description of the court's reasoning is incomplete and misleadingly inaccurate. The court acknowledged that "normally the costs of partition are apportioned in proportion to the interests of the parties," but in this case it believed that "the fairest apportionment of attorneys' fees and costs of suit incurred by [respondents] must be based not upon the percentages of the parties' ownership interests . . . but rather upon equitable considerations." Four factors contributed to this decision: (1) Appellant had used his physical control over the property to deprive the other owners of the property "by seeking to delay the sale and liquidation of the ownership interests of the parties"; (2) Appellant had lived in the house for over 20 years without paying rent to his sisters, even though he had sufficient means to do so; and (3) Appellant made no effort to buy out the interests of his co-owners, whether by obtaining a loan or by selling one or both of his homes in Sacramento, which he owned free and clear and from which he collected rent. In short, the court found, "[h]e is the reason for the litigation and trial in this case." The court did not base its ruling on who had the most possessions on the property; and its comment at a September 2013 hearing reflected its view that appellant "was willing to let [respondents] come [onto] the property, but he would not share the interest in the

property with them." Nor does the court's explanation suggest that it was imposing a "punitive" measure on appellant "simply because he opposed a partition by sale but welcomed a partition in kind—especially in light of his reasonable belief that the sale of a family residence of three generations would not to [*sic*] be in the best interest of all the co-owners."

Attorney's fees are not recoverable as costs unless expressly authorized by statute or contract. (§ 1021; *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 127.) The parties agree that section 874.040 provides the statutory authority for such recovery here. It states, "Except as otherwise provided in this article, the court shall apportion the costs of partition among the parties in proportion to their interests *or make such other apportionment as may be equitable*." (Italics added.) As defined in section 874.010, subdivision (a), costs include "[r]easonable attorney's fees incurred or paid by a party for the common benefit."

When a court has exercised its equitable powers, the order resulting from that act is reviewed under the abuse of discretion standard. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal .4th 1224, 1256.) On appeal, the order is presumed correct. The reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power unless a clear abuse is shown and it appears there has been a miscarriage of justice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331 (*Blank*); *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 (*Denham*).) " 'Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered.' " (*Denham, supra,* at p. 566.) It is the burden of the party challenging an attorney fee and cost award to show an abuse of discretion. (See *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 556; *Blank, supra,* at p. 331.)

In reviewing an award of attorney fees and costs for abuse of discretion, the factual basis of the trial court's decision must be upheld if there is substantial evidence to support its findings, even if the evidence was conflicting and even if this court might

have found in the defendant's favor. (*Finney v. Gomez* (2003) 111 Cal.App.4th 527, 545 (*Finney*).) And "when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. If such substantial evidence [is] found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874, italics omitted.)

The evidence presented at trial was more than sufficient to support the court's decision to impose the cost burden entirely on appellant.[5] It was not merely that appellant opposed the partition by sale that the court found persuasive, but his intransigent refusal to cooperate in fashioning a viable alternative solution to the conflict, along with his unwarranted resistance to discovery by respondents. Appellant resisted the effort by all of his co-owners to sell the property so that they could receive the financial benefit of the sale. In his control the property was "poorly maintained, and was filled with, and appeared to be filled with, belongings from a hoarder." Photographic evidence of the "deplorable" condition of the property was adduced at trial, with rat feces in several locations among the accumulated "stuff" appellant kept there. Plaintiffs' efforts to remove and destroy the "debris and junk" there were "thwarted by [appellant,] who has refused to part with much of his 'stuff.' " Eventually appellant proposed—and urged vigorously at trial—that the property be partitioned in kind, when local law required division into only two parcels. Such division not only was opposed by his siblings, but was an impractical option, according to respondents' expert witness, because

[5] We do not revisit the entire body of evidence supporting the underlying judgment. Issues concerning the appropriateness of the partition by sale would have been properly raised in the companion appeal in H040069, but as we conclude in that case, they have not been preserved for review.

appellant planned to keep the house, which was in the center of the lot, thus making the remaining property "unsalable." Appellant testified that "by whatever means I can retain the land, I would certainly do it." But he admitted at trial that he did not want to sell his Sacramento homes to buy his sisters' interests, nor had he tried to qualify for financing toward that end. Moreover, allowing him to stay on the property, the court found, "would frustrate and inhibit the ability of the parties to sell and maximize the financial value of the asset."

In short, substantial evidence supported the trial court's conclusion that appellant "failed and refused to accept the decisions of the Plaintiffs, as the majority of the owners of the Real Property, in their efforts to sell and maximize the financial value of the Real Property." The court was entitled to rely on the trial evidence in determining that respondents "have been frustrated in their ability to timely receive proceeds of sale, including delays caused by Defendant in the timely decision-making of issues impacting the listing, sale and close of escrow for the transfer of said Real Property to third party purchasers, despite the desire of the father of the parties that each share equally." Appellant even defied the court's order to vacate the property within 30 days, causing yet more hearings—and more attorney fees—on the resulting writ of possession.

Appellant's reliance on *Finney*, *supra*, 111 Cal.App.4th at p. 546 does not help him. In *Finney*, the court viewed section 874.040 as providing only two circumstances in which equitable apportionment may be made instead of allocation based on each owner's respective interest: when the litigation arises among only some of the parties or when the interests of the parties are not identical. As the appellate court in *Lin v. Jeng* (2012) 203 Cal.App.4th 1008, 1022-1025 (*Lin*) later suggested, however, the *Finney* court overlooked the difference between section 874.040 and its predecessor statute, former Code of Civil Procedure section 796. Whereas the prior version of the costs provision allowed for only one specific exception to the general rule of interest-based apportionment—that is, the instance of litigation arising between only some of the

parties—the present statute "broadly allows the trial court to 'make such other apportionment as may be equitable.' " (*Lin*, *supra*, at pp. 1023-1024.) The *Lin* court concluded that there "is no ambiguity in the language of section 874.040. It simply states that the trial court must apportion the costs incurred in a partition action based upon *either* the parties' interests in the property, or equitable considerations. The statute's broad language does not limit the trial court's equitable discretion, and we decline to follow *Finney* by doing so." (*Id*. at p. 1025.)

It is not necessary to address appellant's distinction between the facts of *Lin* and those presented here. We agree with the *Lin* court that section 874.040 permits the court, in its discretion, to apportion fees and costs in a partition action consistently with equity without being constrained by whether the number of parties involved in the action is different from the number owning the partitioned property.

We thus find no abuse of discretion in the superior court's decision to impose the burden of paying the claimed fees and costs for the partition proceeding entirely on appellant. Appellant does not question the specific amounts requested by respondents for these expenses, with the exception of $27,000 for work their attorney performed in July; yet appellant's grievance is not with the reasonableness of that amount, but with the willingness of the court to allow respondents' counsel additional time to substantiate the claim. Appellant did not object to that continuance, and on appeal he provides no argument demonstrating an abuse of discretion in the court's grant of extra time.

Disposition

The December 9, 2013 order is affirmed. Respondents are entitled to their costs on appeal.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.

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